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MICHAEL RODAK, JR.

In The

Supreme Court of the United States

October Term, 1973

No. 73-1013

STONE & WEBSTER ENGINEERING CORPORATION,
Petitioner,

v.

VIRGINIA ELECTRIC & POWER COMPANY,
WHO SUES FOR THE USE AND BENEFIT OF
INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

AND

No. 73-1014

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioners,

v.

VIRGINIA ELECTRIC AND POWER COMPANY,
WHO SUES FOR THE USE AND BENEFIT OF
INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondent respectfully urges that the two above petitions are not well taken, that the opinion below is plainly correct, and that no writ of certiorari should be issued on either petition. Our presentation will be addressed to both petitions without distinction between them.

REASONS FOR DENYING THE WRIT

I.

The Fourth Circuit's Decision Does Not Conflict With Previous Decisions Of The Supreme Court Or With The Interpretations Given To Rules 17(a) And 19, Federal Rules Of Civil Procedure.

Counsel for Virginia Electric and Power Company (hereinafter VEPCO) believe that their legal arguments, for the most part, are adopted, amply set out and even expanded upon somewhat in the opinions of the district court and the court of appeals. These opinions are included in the appendices of the petitioners' briefs when reference to them is needed. In view of this fact, counsel will attempt to limit argument now as provided in U.S. Sup. Ct. Rules 19 and 24, 28 U.S.C.

The decision of the circuit court in the case at bar in no way conflicts with the decision of this Court in *United States* v. *Ætna Cas. & Surety Co.*, 338 U.S. 366 (1949). The *Ætna* cases (there were four on appeal encompassing varied factual situations) arose under the Federal Tort Claims Act (28 U.S.C. §§ 1346(b) and 2674) as suits by partially or fully subrogated insurance companies against the United States. These insurer subrogees were seeking the damages suffered by the subrogor at the hands of government employees. The United States asserted two defenses to prevent these suits by subrogees:

(1) attacking the subrogation arrangement under the dictates of the Anti-Assignment Act (31 U.S.C. § 203) (an act designed to prevent assignments for the purpose of influence peddling) and

(2) saying that the insurer was not a real party in interest under Rule 17(a) Fed. R. Civ. P.

There was no possibility that diversity would be destroyed because of the insurers' citizenships since the Federal Tort Claims Act provides that the federal courts shall have *exclusive jurisdiction* of all such suits. The *Ætna* Court held that transfers by operation of law, such as subrogation, do not fall within the category of evils which the Anti-Assignment Act was designed to prevent. Further, the Court found that the insurers and the insureds were both real parties in interest under Rule 17(a) and could pursue their claims in their own names as necessary parties. At this point, in the opinion, though the Court was not really called upon to say more, it went on to explain in a footnote that the insured on the one hand, and the insurer on the other were ". . . clearly not 'indispensable' parties . . ." in an action brought by the other. *Ætna, supra,* at 382 n. 19. Also the Court recognized that joinder of these parties could not be determined solely by Rule 17(a) but that 17(a) must necessarily be reconciled with Rule 19(b) Fed. R. Civ. P. *Id.* at 382. This homage by the Court to Rule 19 cannot be fully appreciated unless one realizes that *Ætna* was decided in 1949, long before the 1966 Revision to Rule 19 relaxed the joinder requirements. See App. p. 4. Since this 1966 Revision and the decision of this Court in *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102 (1968), the courts are allowed far more latitude as to joinder and as to the practical considerations to be weighed in making the joinder decision. See Westinghouse App. pp. 9-12.

The *Ætna* Court fully realized that in suits against the United States under the Tort Claims Act, there would be cases in which the government could be subjected to multiple actions. 338 U.S. at 382. This drawback was regrettable and was not cited as the preferred and most economical policy for court administration—the desired policy, of course, being the avoidance of a multiplicity of suits. Never-

theless, Westinghouse seizes upon this language in *Ætna* in an effort to split the one federal action before this Court into a Medusa's head of state actions. All along Westinghouse and Stone & Webster have been arguing that the fear of double claims is what made them seek joinder of Insurance Company of North America (hereinafter INA). No wonder the opinion below dealt with multiple claims. This is what the petitioners have previously advanced as their key to dismissal. They now wish to construe to their ends a dissertation by the court below on multiple claims, the petitioners, themselves, elicited. Their intentions now in urging the opposite result are tainted with motives that are more obstructionistic than they are genuine examples of the quest for a forum to decide the issues. By this effort to appeal from an interlocutory appeal, the petitioners are grasping for yet another decision point to postpone the day of reckoning when the merits of the case must be dealt with. The *Provident* Court understood the objecting party's reasoning and disapproved of it in the following passage. "Its [the party objecting to non-joinder] only concern with the absence of Dutcher [the non-diverse party sought to be joined] was and is to obtain a windfall escape from its defeat at trial." *Provident, supra* at 112. As indicated by the Fourth Circuit, respondent would be left with no way to pursue its entire claim, which is essentially interstate in character, if the present action is not allowed to continue. See Westinghouse App. p. 12.

This factor of an alternate remedy is just one of the concerns of Rule 19, along with the multiple claims which the court below considered in making its decision. It is obvious from the Fourth Circuit's opinion that it weighed all the factors set out in Rule 19 and that the decision was not based solely on eradicating the dangers of double liability. See Westinghouse App. pp. 11-12.

Westinghouse in its petition at page 6 says that the court of appeals "disregarded" Rule 17(a) and, by their "avoiding" it, escaped the workings of *Strawbridge* v. *Curtiss,* 3 Cranch 267 (1806). A mere perusal of the opinion below discloses that this charge is not well founded. See Westinghouse App. p. 8 n. 13. What the court did was to begin its examination of the problem of joinder by reference to Rule 17. When the court reached the impasse which Rule 17 presents when it indicates joinder of a reluctant or non-diverse party, it looked, as it must, to Rule 19. Under Rule 19, the court of appeals meticulously satisfied itself that no undeserved harm would fall on Westinghouse and Stone & Webster by allowing the district court's decision to stand and the action to continue without joinder of INA. But Westinghouse and Stone & Webster seem to consider Rule 17 to be procedural Rosetta Stone to be used in the decipherment of legal conundrums, without reference to and quite apart from the other rules of procedure and decisions interpreting them. The Fourth Circuit correctly refused to read Rule 17 in a vacuum and thereby reach the absurd results foisted on this Court by Westinghouse and Stone & Webster. See Westinghouse App. p. 9.

Charles Alan Wright in his treatise describes the procedure which is required under the rules.

> Once the requirements of Rule 17 have been complied with, and it has been decided that a particular individual or entity is a party in interest with capacity to sue or be sued, it is necessary to go one more step and decide whether the person has such a strong interest in the litigation that his joinder ought to be compelled. C. Wright, Law of Federal Courts, (1970 ed.) at 296.

The author in an expanded work goes on to say that

> . . . the question of who should or may be joined in

> the action must be determined under Rule 19 and Rule 20 rather than Rule 17(a). [*Watsontown Brick Co.* v. *Hercules Powder Co.*, 201 F. Supp. 343 (M.D. Pa. 1962); *Morelli* v. *Northwest Engineering Corp.*, 30 F.R.D. 522 (E.D. Wisc. 1962)] C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1543 at 646 (hereinafter cited as *Wright & Miller*).

Another commentator concludes:

> [i]n sum, Rule 17(a) should not be read as an absolute exception which allows exclusion or compels joinder apart from Rule 19. Perhaps the inconsistencies between Rule 17(a) and 19 could best be reconciled by restating Rule 17(a) as a permissive joinder rule. Kennedy, *Federal Rule 17(a); Will the Real Party in Interest Please Stand?*, 51 Minn. L. Rev. 675, 680 (1967).

Thus it is clear that when the limited purpose of Rule 17 has been fulfilled, the courts must, as did the district and circuit courts below, apply the practical solutions provided by Rule 19 and expounded upon by this Court in the *Provident* case. See Westinghouse App. p. 9.

II.

The Fourth Circuit's Decision Does Not Conflict With The Decisions Of The Other Circuit Courts.

Westinghouse cites *Sunray Oil Corp.* v. *Allbritton*, 187 F.2d 475 (1951) as an example of further conflict with the decision below. *Sunray* involved a suit by a worker Allbritton against a contractor Sunray, on whose oil derrick Allbritton was injured while in the scope of his employment in Texas with an independent contractor. Allbritton was partially compensated for his injuries pursuant to the Texas Workmen's Compensation Insurance carried by his em-

ployer, the independent contractor. The workmen's compensation carrier attempted by agreement with Allbritton (without joining with him in the suit and, in fact, refusing to join therein) to have him recover its portion of the claim against the contractor. The carrier sought this relief under the theory that Allbritton was its trustee (as provided in Rule 17) for the recovery of the compensation paid to him. There was no mention of any diversity problem. In rejecting this argument and holding that the judgment be reduced by the amount of the carrier's claim, the court in the following language referred to the substantive state rights created. ". . . [I]t is now settled by the Texas law that the employee's right to recover against third persons is limited to damages in excess of the compensation paid to him." *Sunray, supra* at 477.

Counsel for VEPCO certainly do not contend that one who does not have the substantive right to sue may maintain an action, but the Fourth Circuit in its opinion properly found that

> . . . VEPCO, as subrogor, is entitled under the substantive law [of Virginia] to bring suit for its entire loss. VEPCO, being entitled to enforce the right, may bring their action even though INA will ultimately receive the major portion of any recovery. See Westinghouse App. p. 7.

Though interpretation of the substantive law of Virginia is not the proper subject of this brief, counsel felt constrained by Westinghouse's misplaced reliance on *Sunray* to provide at least the short rejoinder above.

In addition to the factual and substantive law differences between *Sunray* and the case before this Court, there are later opinions by the Fifth Circuit Court of Appeals which illustrate that court's understanding that the law of the

forum governs what claims may properly be pursued and by whom. *Peoples Loan & Finance Corp.* v. *Lawson*, 271 F.2d 529 (5th Cir. 1959) (distinguishing *Ætna*); *Celanese Corp.* v. *John Clark Indus., Inc.*, 214 F.2d 551 (5th Cir. 1954); see Westinghouse App. p. 10 n. 17. The Fifth Circuit's view does not clash with the principles stated by the Fourth Circuit in the case at bar. Moreover, there is no indication that the Fifth Circuit is or was confused, even at the time of its 1951 *Sunray* decision, in its approach to the problems of joinder or non-joinder of a real party in interest.

Just as *Sunray* is distinguishable on its facts and law, so are the rest of the cases cited by Westinghouse for the proposition that Rule 17(a) must be read apart from the other rules.[1] Broadly, these cases can be distinguished by the fact that none of them deals with an absent party whose joinder would destroy diversity. Thus the workings of Rule 19 are not called into play. The decisions themselves reflect their limited application. In *Gas Service Co.* v. *Hunt*, 183 F.2d 417 (10th Cir. 1950) the court held that ". . . *with certain exceptions* not having material bearing here, upon timely motion of the alleged wrongdoer, the . . . [insurer subrogee] should be joined as a party." *Id.* at 419 (emphasis added). This is an obvious reference to the fact that no diversity problems existed in joining the insurer and this was in 1950 before the revision to Rules 17(a) and 19! The decision in *City Stores Co.* v. *Lerner Shops, Inc.*, 410 F.2d 1010 (D.C. Cir. 1969) cited by Westinghouse is even less persuasive. Not only was there no diversity quandary in *Lerner*, but it also was a case of full subrogation.

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[1] *Gas Service Co.* v. *Hunt*, 183 F.2d 417 (10th Cir. 1950); *City Stores Co.* v. *Lerner Shops, Inc.*, 410 F.2d 1010 (D.C. Cir. 1969); *Askey* v. *C & M Service*, 45 F.R.D. 242 (M.D. Pa. 1968); *Northboro Apartments, Inc.* v. *Wheatland Tube Co.*, 198 F. Supp. 245 (E.D. Pa. 1961); *McWhirter* v. *Otis Elevator Co.*, 40 F. Supp. 11 (W.D. S.C. 1941).

III.

Nominal Parties, Collusion And Ratification.

Stone & Webster attempts to gain the attention of this Court through the introduction of a line of cases dealing with nominal parties and diversity. Stone & Webster Petition pp. 5-6. A reading of these cases reveals that the nominal parties concerned are administrators, governors, justices of the peace, trustees and other uninterested functionaries, acting in their official capacities as provided by state and federal law. It is through these functionaries—legal fictions really—that the substantive interest of the aggrieved party may be pursued. VEPCO as a partial subrogor is not such a nominal party, since it is the repository of the legal right of action, has a substantial claim in its own right and is the foundation upon which rests the claim of any subrogee. See Westinghouse App. p. 7 text and n. 9.

In a like manner, Stone & Webster attempts to raise the ugly head of collusion in alluding to this Court's decision in *Kramer* v. *Caribbean Mills, Inc.,* 394 U.S. 823 (1969), holding invalid a collusive assignment to create diversity jurisdiction. There has never been any collusive assignment presented which could lead to the mention of collusion as an issue in the case at bar. Subrogation in Virginia comes about by operation of law. The fact that VEPCO and INA formalized this basic principle does not make it any less valid. See Westinghouse App. p. 7 n. 9.

Rule 17(a) itself provides yet another procedure by which the protestations of the petitioners may be calmed. By amendment in 1966 the following sentence was added to Rule 17(a).

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for *ratification* of commencement of the action by, or

> joinder or substitution of, the real party in interest; and such ***ratification,*** joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest. Rule 17(a) Fed. R. Civ. P. (emphasis added).

Ratification has been approved by the courts and included in *Wright & Miller* as a viable alternative to joinder. *Wright & Miller* provide this background and explanation:

> Formal joinder or substitution of the real party in interest will not be necessary when he ratifies the commencement of the action. The reference to "ratification" in Rule 17(a) seems to be a carryover from the original draft of the sentence added in 1966, which was to apply only to certain maritime proceedings, and probably was intended to adopt the procedure in salvage actions by which non-parties seek their share of the recovered property. Nonetheless, some federal courts have interpreted the words to validate an arrangement by which the real party in interest authorizes the continuation of an action brought by another and agrees to be bound by its result, thereby eliminating any risk of multiple liability. [*Southern Nat. Bank of Houston, Tex.* v. *Tri Financial Corp.*, 317 F. Supp. 1173, 1186 (S.D. Tex. 1970)] *Wright & Miller* § 1555 at 709.

Knowing that INA had ratified and agreed to be bound by any decision in the case at bar, the Fourth Circuit lent its weight to the ratification solution in observing that ". . . the subrogee may agree to be bound by the judgment . . ." and thus satisfy the requirements of Rule 17. See Westinghouse App. p. 9 n. 15; *Urrutia Aviation Enterprises, Inc.* v. *B. B. Urson & Assoc.*, 406 F.2d 769 (5th Cir. 1969).

CONCLUSION

Westinghouse and Stone & Webster urge what they term "reality" on this Court. In fact it is VEPCO which has

made full voluntary disclosure of the interests of INA and confronted the courts with the realities. Reality here is that both the petitioners, though only one shares citizenship with INA, are trying to frustrate the greater part of a claim which has been lodged against them. Petitioners say this maneuver is justified because part of the loss, it is alleged they caused, was insured by a non-diverse company to Westinghouse. This accident of insurance should not be allowed to impede an action essentially interstate in character—an action which was begun in 1967 and can now be ended once and for all in federal court or, failing that, probably not at all at this late date.

As demonstrated no conflict exists between the decision below and the decisions of this Court or between the decision below and those of any of the courts of appeals. Nor was the interpretation given to Rules 17(a) and 19 by the Fourth Circuit incorrect. Nor did the Court "disregard" or "avoid" Rule 17. In short, the Fourth Circuit was plainly right in upholding the decision of the district court.

For these reasons the writ of certiorari should be denied.

Respectfully submitted,

VIRGINIA ELECTRIC AND POWER COMPANY who sues for the use and benefit of Insurance Company of North America

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APPENDIX

FEDERAL RULES OF CIVIL PROCEDURE

Rule 17

Parties Plaintiff And Defendant; Capacity

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action has been commenced in the name of the real party in interest.

(b) Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United

States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C. §§ 754 and 959(a).

(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person. As amended Dec. 27, 1946, Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.

1949 Amendment

Deleted the words "Rule 66" at the end of subdivision (b) and substituted "Title 28, U.S.C., §§ 754 and 959(a)."

1966 Amendment

Inserted in subdivision (a) the word "bailee"; and added the third sentence.

Rule 19

Joinder Of Persons Needed For Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1)

in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the

pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

1966 Amendment

Gave the rule its present wording. Prior thereto the rule provided:

"*(a) Necessary Joinder.* Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

"*(b) Effect of Failure to Join.* When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

"*(c) Same: Names of Omitted Persons and Reasons for Non-Joinder to be Pleaded.* In any pleading in which relief

is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted."

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing brief and appendix were delivered to James L. Sanderlin, Esquire, McGuire, Woods & Battle, 1400 Ross Building, Richmond, Virginia 23219, counsel for petitioner, Westinghouse Electric Corporation and three copies were delivered to Charles W. Laughlin, Esquire, Christian, Barton, Parker, Epps & Brent, 1200 Mutual Building, Richmond, Virginia 23219, counsel for petitioner, Stone & Webster Engineering Corporation, on or before January 28, 1974.

I further certify that I am a member of the Bar of the Supreme Court of the United States, and that all parties required by law to be served have been served.

EDWARD A. MARKS, JR.
Of Counsel for Respondent